

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NUMBER: 58324/09

MYBURGH, WANDA

And

MYBURGH, BAREND JACOBUS

RESPONDENT

7/10/2010

DELETE WHICHEVER IS NOT APPLICABLE	
(1) RESPONDENT'S APPLICANT'S	YES/NO.
(2) OF INTEREST TO OTHER JUDGES:	YES/NO.
(3) REVISED	
7 October 2010	<i>Jelhap</i>
DATE	SIGNATURE

JUDGEMENT

TLHAPI, J

[1] This is an opposed application where the applicant seeks the following order, that :

1. It be declared that the Respondent is in contempt of the Order issued in this Honourable Court under case number, 31881/2008.
2. the Respondent be sentenced to jail for a period of 60 (sixty) days. alternatively, such sentence be imposed by this Honourable Court as this Honourable Court may deem just in respect of the contempt.
3. the entire sentence imposed by the Honourable Court be suspended upon such terms and conditions as the Honourable

Court may deem just including the compliance by the Respondent of his obligations arising from the Order issued under case number 31881/2008 and the immediate payment of all arrears owing in respect of the Order.

4. the Respondent be ordered to pay costs hereof."

The application was served on the respondent on the 22 September 2009 and he filed his answering affidavit four months later, on the 22 January 2010. The matter had been postponed sine die at the instance of the respondent who also paid the wasted costs.

THE FACTS

- [2] The parties were married to each other out of community of property with the incorporation of the Accrual System. No children were born of their marriage. Pursuant to a Rule 43 application the respondent was ordered to pay:
 1. maintenance to the applicant in the sum of R15 000.00 per month on or before the first day of every month, the first payment to be paid on or before 1 September 2008;
 2. that the respondent retain and pay for medical premiums payable in terms of the applicant on his medical aid scheme;
 3. a contribution towards costs in the sum of R3 500.00;
- [3] Although the respondent paid maintenance as ordered for the months September 2008 to February 2009 he failed to pay such maintenance timeously. He further failed to pay maintenance as ordered for the months March to September 2009 and was as a result in arrears in the sum of

R105 000.00. Again, the respondent was in arrears with his payment of the medical aid premiums on behalf of the applicant in the sum of R5 499.00 and as a result the medical aid lapsed. Furthermore, the respondent had failed to make any contribution towards costs as ordered by the court.

[4] The applicant requested the respondent to supply the court with the following information, in the event of him opposing this application:

- ' 1. Full particulars of his income and expenses for the past twelve months;
2. Copies of his latest credit card and banking statements for the past twelve months;
3. Copies of the financial statements in respect of any entity of which respondent has a right title and interest therein;'

Subsequent to the launch of this application and on the 20 November 2009 the respondent paid a sum of R115 000.00 for arrear maintenance and R3 500.00 in respect of contribution for costs.

[5] The respondent a businessman, denied that he was in contempt of the court order. While not denying his liability he averred that his failure to pay maintenance and medical aid premiums was due to a material change in his business and to his financial circumstances. Due to his problems he forgot to make any contribution towards costs. He approached his attorney to explain his steadily deteriorating financial circumstances and he was advised to continue to pay, if not from his income, then from his net assets. He was never informed that he could approach the court to vary the order. At the time of deposing to his affidavit he was receiving no income. He had stopped trading as B J Powder Coatings in September 2008. Despite lawful demand

his collection agent had not been able to recover any monies from a client who owed him a sum of R560 000.00. He owned 6 vehicles, together valued at R150 000.00 and a vehicle stand which was not bonded and which had a market value of about R900 000.00. The stand was put up for sale.

Due to his dire financial circumstances he could not provide any information in the form of income and expenditure statements because his transactions were for cash and he had failed to keep proper records. He was also being sued for the sum of R100 00.00 by his former landlord for outstanding rent and costs in this matter could total about R50 000.00.

[E] The respondent annexed a few bank statements to his answering affidavit:

1. Gold Card statement for the period 20 December 2008 to 20 January 2009: He owed R15 743.74 this statement showed that he was in arrears with the payment and payment of R2 451.58 was expected by the 14 February 2009.
2. ABSA credit statement for the period 27 September to 29 October 2008. The balance owing was R20 221.92 and credit available was R5 328.08.
3. ABSA cheque account for the periods 3 November to 2 December 2008 and 3 December 2008 to 2 January 2009

[E] The respondent averred further that the applicant had withdrawn a sum of R203 000.00 from their joint account without his permission and that she had to account regarding his share. He contended that she could have used his share to make up for his failure to pay maintenance. His credit cards were drawn to the limit, his bank account was closed and the bank refused to give statements as they intended litigating against him. He could not give any

income and expenditure statements. He annexed copies of his current credit cards and a copy of a bank statement dated December 2008, the latter account had been closed.

- [6] Annexures 'X1 to X4' of the replying affidavit showed that the respondent had access to income at the time at which payment for maintenance should have been made. Contrary to his explanation regarding B J Powder Coatings a delivery note of B J Tools & Engineering CC showed that the respondent was still trading as B J Powder Coating. Regarding the R560 000.00 debt, the applicant established that Poseidon Design was the customer referred to. She contacted the said customer and they acknowledged to the applicant that they had made payment and had signed an acknowledgement for the outstanding amount.
- [7] The applicant denied that the respondent was without income because the respondent had been trading under BEC Engineering and further that he held other accounts with ABSA not revealed to the court.

THE LAW

- [8] The approach to civil contempt proceedings was set out in *Fakie v CC11 Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 344 H-C:

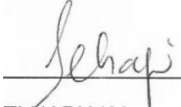
- " (c) the applicant must prove the requisites of contempt (the order, service or notice; non-compliance; and wilfulness and *mala fides*), beyond a reasonable doubt.
- (d) But once the applicant has proved the order, service or notice and

non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond a reasonable doubt.”

- [9] The existence of the order, and non compliance which was admitted by the respondent, are common factors. What remains to be established is whether the non-compliance by the respondent of the order of the court, was wilful and *mala fide*. There was compliance with the order, though not timeously from September 2008 to February 2009 then followed the payment on the 20 November 2009 for the months March 2009 to September 2009 and payment for the contribution of costs. Any facts relating to the ability of the respondent to pay could not be speculated upon by the applicant. It is my view that in order to prove wilfulness and *mala fides* the applicant had to show that during this time there were sufficient funds from which payment could have been made, and that despite demand the respondent failed to make any payment. If these facts were proved then respondent's contempt could have been established beyond a reasonable doubt.
- [10] The conduct of the respondent and his ability to honour the court order could be determined from the bank statements and his explanation regarding the state of his business and the reason why he failed to bring an application to vary the order. It was not sufficient for the applicant to only allege that the respondent had an income, without providing the necessary information from which the court could establish such fact. The fact that the availability of funds was addressed in paragraph five of the replying affidavit does not take the

matter any further, the issue is whether the applicant proved that non-payment was wilful and mala fide. It was evident from paragraph fifteen of the founding affidavit that in order to succeed applicant would have relied on the information she was hoping to source from the respondent in the form of bank, credit and financial statements in order to prove her case and in as far as these could have been disputed, a dispute of fact would have arisen. The issues addressed in the replying affidavit regarding respondent's creditor Poseidon Design and the proprietorship of BEC Engineering do not prove that there were monies available to the respondent which would have enabled him to honour the court order. I am of the view that the respondent's evidence established reasonable doubt that the non-compliance was wilful and mala fide.

[11] In the result, the application is dismissed with costs.



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JUDGE OF THE HIGH COURT